

Docket No. 1,021,634

On February 19, 2009, a post-award hearing on medical treatment was held. Both parties appeared and the issue was resolved. Claimant's counsel indicated that he would be requesting post-award attorney fees. Following the filing of that request, along with an itemized billing statement, the ALJ issued an order directing respondent to pay claimant's

attorney post-award attorney fees in the sum of \$1,050.00 for 7 hours of work at \$150.00 an hour.

The claimant's attorney requests review of this order arguing the hourly rate should be \$175.00 instead of \$150.00. Claimant's attorney urges the Board "to consider the opinion of Mr. Shetlar<sup>1</sup> that \$175 per hour for claimant's attorney's fees in a post-award matter is reasonable and should be standard".<sup>2</sup>

Respondent argues that the Order should be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

There is no dispute that claimant's counsel is entitled to fees for the time spent in connection with the post-award issue relating to claimant's medical treatment. That issue was addressed and apparently resolved at the February 19, 2009 post-award hearing. Claimant's counsel indicated he would be filing a request for those fees and he was specifically directed to submit a copy of that request and the itemization for his time to respondent's counsel. Claimant's counsel complied with that directive and asked for a total fee of \$175 per hour, for 7 hours resulting in a total fee of \$1,225.00.

By letter, the ALJ directed the respondent to file any response or objection to that request by March 2, 2009. No response was filed. Thereafter, an Order was entered granting claimant's counsel a fee in the sum of \$1,050.00, based upon 7 hours of work at \$150 per hour.

Claimant's counsel takes issue with this finding and asks the Board to increase the hourly rate. His sole argument in support of this contention is as follows:

I refer the Board to the testimony of Mr. James Shetlar, who testified at a hearing before ALJ Hursh on October 30, 2008, in Overland Park, in the case of *Walia*, docket no. 1,006,825. I urge the Board to consider the opinion of Mr. Shetlar that \$175 per hour for claimant's attorney's fees in a post-award matter is reasonable and should be the standard henceforth.<sup>3</sup>

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<sup>1</sup> Mr. James Shetlar testified on October 30, 2008 at a hearing before Judge Hursh in the case of *Walia v. Trimodal Inc.*, Docket No. 1,006,825 on this issue and that case is pending with the Board. But that testimony was not offered as evidence in this case and is therefore not part of the record in this matter.

<sup>2</sup> Claimant's Brief (filed Mar. 11, 2009).

<sup>3</sup> *Id.*

Respondent now contends that \$175 per hour is an excessive rate in the Kansas City area, notwithstanding Mr. Shetlar's testimony. Respondent points to other cases where the Board has approved attorneys fees between \$125 and \$150 an hour. Accordingly, respondent maintains the ALJ's Order should be affirmed.

After considering the record as a whole, the Board finds the ALJ's Order should be affirmed, albeit for a different rationale than advanced by respondent.

Claimant inappropriately suggests that testimony from an entirely different claim - *and one in which this respondent (and its counsel) were not a party* - should be considered for purposes of assessing post-award attorneys fees. This practice flies in the face of the rules of evidence and fundamental fairness intended by the litigation process.<sup>4</sup> Claimant would have this Board utilize testimony from a wholly unrelated case that his counsel just happens to be involved but was, in fact, not offered into evidence. Yet, neither respondent nor its counsel is a party to that other action, has any awareness whatsoever of the issues involved nor the content of the witnesses' testimony, including that of Mr. Shetlar, a Kansas City area attorney, other than the reference made by claimant's counsel in a submission letter. This is an inappropriate use of deposition testimony.

Nonetheless, when claimant's counsel filed his motion for attorneys fees and submitted his itemized statement indicating his desire to be paid \$175 per hour, respondent stood silent both as to the hourly rate and the number of hours billed. Had he believed his opposing counsel's expectations were outside the norm, he could have objected, requesting a hearing and presented evidence in a timely fashion *as directed by the ALJ*. But he failed to do so. It was only after the ALJ entered her Order for something less than claimant's counsel sought and appealed that respondent filed any sort of objection to opposing counsel's request.

As it stands, other than statements of counsel in their respective briefs, the record is devoid of any evidence concerning what would be a reasonable hourly rate.

The Board finds that claimant's counsel's itemization for time involved and the rate to be changed in this post-award matter was unchallenged before the ALJ. The ALJ assessed an hourly rate of \$150 per hour. A judge is considered to be an expert on the issue of attorney fees.<sup>5</sup> Indeed, the Board has approved this rate in other cases.<sup>6</sup> But the Board is unwilling to find, as suggested by claimant's counsel, that a single figure opined by one particular attorney is the gold standard in all future litigation. Under these facts and

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<sup>4</sup> K.S.A. 60-232.

<sup>5</sup> See e.g., *City of Wichita v. B G Products Inc.*, 252 Kan 367, 373-73, 845 P.2d 649 (1993).

<sup>6</sup> See e.g., *Gann v. USF Dugan*, No. 245,887, 2008 WL 4857908 (WCAB Oct. 28, 2008).

circumstances, the Board affirms the ALJ's post-award Order granting claimant's attorney fees in the sum of \$1,050.00 for the time incurred in this matter.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the post-award Order of Administrative Law Judge Rebecca Sanders dated March 3, 2009, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant  
Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge